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BEFORE THE ARIZONA CORPORATION COMMISSION P 1:37

WILLIAM A. MUNDELL
CHAIRMAN

Arizona Corporation Commission

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ARIZONA CORPORATION COMMISSION
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JIM IRVIN

COMMISSIONER

MAR 22 2002

MARC SPITZER

COMMISSIONER

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IN THE MATTER OF THE APPLICATION
OF THE ARIZONA ELECTRIC DIVISION
OF CITIZENS COMMUNICATIONS
COMPANY TO CHANGE THE CURRENT
PURCHASED POWER AND FUEL
ADJUSTMENT CLAUSE RATE, TO
ESTABLISH A NEW PURCHASED POWER
AND FUEL ADJUSTMENT CLAUSE BANK,
AND TO REQUEST APPROVED
GUIDELINES FOR THE RECOVERY OF
COSTS INCURRED IN CONNECTION
WITH ENERGY RISK MANAGEMENT
INITIATIVES.

DOCKET NO. E-01032C-00-0751

**SUPPLEMENT TO CITIZENS'
OPPOSITION TO THE
MAGRUDER MOTION TO
RECUSE**

GALLAGHER & KENNEDY, P.A.
2575 E. CAMELBACK ROAD
PHOENIX, ARIZONA 85016-9225
(602) 530-8000

As requested by the Commission, Citizens submits this Supplement to the

Citizens' opposition dated March 18, 2002. Affidavits concerning the subject matters
discussed with the parties and the Commission are attached hereto and incorporated
herein as Exhibits A, B and C..

BACKGROUND.

This proceeding involves, inter alia, Citizens' request to recover amounts
paid to Arizona Public Service Company (APS), and subsequently, Pinnacle West Capital
Corporation ("PWC") above the base cost of purchased power pursuant to PPFAC
procedures authorized by the Commission. Citizens has a longstanding power supply

1 relationship with APS and, more recently, PWC. Neither APS nor PWC is involved in
2 this proceeding.

3 Undersigned counsel commenced representation of Citizens in this matter
4 after the original application was filed in September 2000. The record in this matter
5 reflects that the law firm of Gallagher & Kennedy, P.A. has never represented either
6 Citizens or APS/PWC in any contractual disputes concerning the 1995 APS PSA or the
7 2001 PWC PSA. Citizens has been represented in those matters by Wright & Talisman,
8 Troutman Sanders and others (See Rebuttal and Rejoinder testimonies of Mssrs. Breen
9 and Flynn). The attached affidavits by Mr. Gallagher and Ms. Smith indicate that the
10 APS and PWC Boards never voted on the four identified Power Supply Matters involving
11 Citizens.

12 The Commission also asked counsel to supply a legal memorandum on two
13 subjects related to the Code of Professional Conduct and an issue concerning
14 Commission jurisdiction on those subjects that are addressed below.

15 **RESPONSE TO QUESTIONS.**

16 A lawyer can serve on a corporation's board of directors while that lawyer,
17 or the lawyer's firm, serves as counsel for the corporation. See Comment to Rule 1.7;
18 Arizona Legal Ethics Handbook § 1.13:220, citing Standing Committee on Ethics and
19 Professional Responsibility of the American Bar Association ("Standing Committee")
20 Formal Opinion 98-410. Such service is prohibited only when there is a material risk that
21 the dual role of director and lawyer will compromise the lawyer's independence of
22 professional judgment. Comment to ER 1.7. In Formal Opinion 98-410, the Standing

1 Committee noted that while the potential for conflicts of interest could arise in a situation
2 where a lawyer was also a director, potential problems could be cured by frank
3 discussions with the corporation regarding the scope of the lawyer's service as director.

4 In fact, the Restatement specifically addresses a scenario where a client
5 sought representation from the lawyer/director in a matter adverse to the corporation the
6 lawyer served as director. In that case, the Restatement acknowledged that the lawyer
7 could even undertake that representation so long as each client consented and it was
8 reasonable that the lawyer could provide adequate representation. Comment d to
9 Restatement (Third) of the Law Governing Lawyers § 135; § 122(2).

10 In this case, Mr. Gallagher functioned only as a director of and does not
11 represent APS or PWC as a lawyer. Firm policy prohibits Mr. Gallagher's involvement
12 in any matters concerning or affecting APS or PWC. In addition, APS understood that
13 the Firm represented Citizens in various capacities, including this matter, and signed a
14 waiver with respect to the Firm's representation of Citizens in this case.

15 Further, it is uniformly recognized that a firm may represent one client in a
16 matter directly adverse to another client. See Arizona Rules of Professional
17 Responsibility 1.7(a); Restatement (Third) of the Law Governing Lawyers § 122. This
18 representation is entirely ethical so long as the lawyer reasonably believes that the
19 representation will not adversely affect the relationship with the other client, and each
20 client consents after consultation. Id. Of course, in this case, the Firm did not represent
21 Citizens with respect to its decision regarding whether to seek recovery of any amounts
22 from APS or PWC.

1 Given these facts, there is not even the appearance of impropriety and
2 recusal is simply not warranted. Gomez v. Superior Court In & For Pinal Cty., 149 Ariz.
3 223, 717 P.2d 902 (1986).

4 As noted above, the Firm's representation complies with and exceeds the
5 standards set by Arizona's ethical rules and Rule 41 of the Rules of the Supreme Court.
6 As a matter of law, therefore, granting Mr. McGruder's motion to recuse G&K would
7 violate governing ethical rules laid down by the Arizona Supreme Court. Further, the
8 Corporation Commission has no jurisdiction or authority to disqualify G&K and regulate
9 the practice of law.

10 As a matter of fundamental Arizona law, the Corporation Commission is an
11 agency of limited jurisdiction. "The Corporation Commission's powers are limited and
12 do not exceed those to be derived from a strict construction of the Constitution and
13 implementing statutes." Williams v. Pipe Trades Industry Program of Arizona, 100 Ariz.
14 14, 19, 409 P.2d 720, 723 (1966); Tonto Creek Estates Homeowners Ass'n v. Arizona
15 Corporation Comm'n, 177 Ariz. 49, 51, 864 P.2d 1081, 1083 (App. 1993). Specifically,
16 the Commission is not vested with any powers of a court of general jurisdiction; instead,
17 "no judicial power is vested in or can be exercised by the corporation commission unless
18 that power is expressly granted by the constitution." Trico Electric Cooperative v.
19 Ralston, 67 Ariz. 358, 359, 196 P.2d 470 (1948) (holding that Commission has no
20 authority to interpret option contract).

21 Here, the Commission has no constitutional power or authority to regulate
22 the "practice of law" by applying disqualification standards other than those adopted by

1 the Arizona Supreme Court. In fact, the Commission's own procedural rules
2 acknowledge that it is bound by those Supreme Court rules: "All persons appearing
3 before the Commission or a presiding officer in any proceeding shall conform to the
4 conduct expected in the Superior Court of the state of Arizona." See A.A.C. R14-3-
5 104(F)(1).

6 In Arizona, our courts have uniformly held that under Article III of the
7 Constitution "the practice of law is a matter exclusively within the authority of the
8 Judiciary. The determination of who shall practice law in Arizona and under what
9 conditions is a function placed by the state constitution" in the Arizona Supreme Court.
10 In Re: Creasy, 198 Ariz. 539, 540-541, 12 P.3d 214, 215-216 (2000); Hunt v. Maricopa
11 County Employees Merit System Comm'n, 127 Ariz. 259, 619 P.2d 1036 (1980). See
12 also, Russo v. City of Tucson, 20 Ariz. App. 401, 513 P.2d 690 (1973) ("We agree with
13 appellants that the City of Tucson cannot regulate and license persons to practice law
14 within the state"). It also bears emphasis that "practice before an administrative agency
15 is the practice of law." Hunt, 127 Ariz. at 262, 619 P.2d at 1039. Specifically,
16 "representation of others in proceedings before administrative agencies such as the
17 Arizona Corporation Commission constitutes the practice of law in Arizona." Ariz. Atty.
18 Gen. Op. I87-053.

19 Since the pending recusal motion "involves the practice of law, [the
20 Supreme Court] has the ultimate authority" and the Commission must apply and abide by
21 the governing ethical standards. See In Re: Member of the State Bar, 128 Ariz. 238, 239,
22 624 P.2d 1286, 1287 (1981). The Commission has neither the power to license someone

1 to practice law who is not permitted to do so by the Supreme Court of Arizona or
2 disqualify someone from practicing law who is permitted to do so by the Supreme Court.
3 See Anamax Mining Co. v. Arizona Dep't of Economic Security, 147 Ariz. 482, 711 P.2d
4 621 (App. 1985).

5 **CONCLUSION.**

6 Both the facts and law demonstrate that the Motion to Recuse is not well
7 taken and must be denied.

8 RESPECTFULLY submitted this 22nd day of March, 2002.

9 GALLAGHER & KENNEDY, P.A.

10
11 By



Michael M. Grant
Todd C. Wiley
2575 East Camelback Road
Phoenix, Arizona 85016-9225
Attorneys for Citizens Communications
Company

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17
18 **Original** and ten copies filed this
22nd of March, 2002, with:

19 Docket Control
20 Arizona Corporation Commission
1200 West Washington
21 Phoenix, Arizona 85007
22

1 **COPY** of the foregoing hand-delivered
2 this 22nd of March, 2002 to:

3 Lyn Farmer
4 Chief Administrative Law Judge
5 Hearing Division
6 Arizona Corporation Commission
7 1200 W. Washington
8 Phoenix, AZ 85007

9 Commissioner William Mundell
10 Arizona Corporation Commission
11 1200 West Washington
12 Phoenix, Arizona 85007

13 Commissioner Jim Irvin
14 Arizona Corporation Commission
15 1200 West Washington
16 Phoenix, Arizona 85007

17 Commissioner Marc Spitzer
18 Arizona Corporation Commission
19 1200 West Washington
20 Phoenix, Arizona 85007

21 **COPIES** of the foregoing hand-delivered
22 and/or mailed or e-mailed this 22nd
day of March, 2002, to:

Walter W. Meek
Arizona Utility Investors Association
2100 North Central Ave., Suite 210
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Christopher Kempley, Chief Counsel
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15 Kingman, Arizona 86402-7000

16 Marshall and Lucy Magruder
Post Office Box 1267
17 Tubac, Arizona 85646-1267

18 By: Beth Oakley
19 1003870v1

20

21

22

EXHIBIT A

AFFIDAVIT OF MICHAEL L. GALLAGHER

1
2 State of Arizona)
) ss.
3 County of Maricopa)

4 I, Michael L. Gallagher, being duly sworn upon my oath, state as follows:

5 1. I am a founding member of the law firm of Gallagher & Kennedy,
6 P.A. ("G&K").

7 2. I presently am a shareholder and attorney in G&K but left its Board
8 of Directors in 1998.

9 3. Since 1999, I have served on the Board of Directors of Pinnacle
10 West Capital Corporation ("PWC") and since 1997 I have served on the Board of
11 Directors of Arizona Public Service Company ("APS").

12 4. During my tenure on both Boards of Directors, I also have served on
13 the following Board Committees for PWC: Finance and Planning (5/19/99 to 5/17/00)
14 and Human Resources (5/19/99 to present). I have served on the following Board
15 Committees for APS: Finance Operating and Environmental (1997 – 1998); Nuclear
16 (1997 - 1998); Finance & Environmental (1999 – June 2000); and Generation (1999 –
17 June 2000).

18 5. I do not recall ever having voted while serving on the PWC or APS
19 Boards of Directors or committees on any of the following matters: (1) the 1995 Power
20 Service Agreement ("PSA") between Citizens Communications Company ("Citizens")
21 and APS; (2) the 2001 PSA between Citizens and PWC; (3) an Agreement entitled
22 "Terms of a Potential Restructuring of the Existing Power Supply Agreement Between

1 Citizens Utilities and APS" dated May 18, 2000 or (4) PWC's Market-Rate Tariff and
2 Modified Code of Conduct filing in FERC Docket ER00-2268-000 (collectively, the
3 "Power Supply Matters").

4 6. At G&K's request, PWC and APS were asked to review minutes of
5 Board of Directors meetings in which I participated to determine if they reflected any
6 Board vote on the Power Supply Matters and they are in the process of responding to that
7 inquiry.

8 7. I have no knowledge of the Power Supply Matters or any of the
9 matters involved in the Citizens PPFAC proceeding in Arizona Corporation Commission
10 Docket No. E-01032C-00-0751 and I have never talked to any PWC, APS, Citizens
11 personnel or G & K attorneys about any of the Power Supply Matters or matters involved
12 in that proceeding.

13
14 
Michael L. Gallagher

15 SUBSCRIBED AND SWORN TO before me this 22nd day of March
16 2002 by Michael L. Gallagher.

17 
18 Notary Public

19 My Commission Expires:

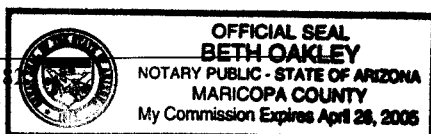


EXHIBIT B

AFFIDAVIT

STATE OF ARIZONA)
 : ss.
County of Maricopa)

I, Martha Smith, being duly sworn upon my oath, state as follows:

1. I am a duly authorized Custodian of Records for Arizona Public Service Company (APS) and Pinnacle West Capital Corporation (PNW).
2. This affidavit is prepared in response to a request from the Arizona Corporation Commission.
3. I have reviewed the minutes of the APS and PNW Boards of Directors meetings from 1994 to the present.
4. The APS and PNW Boards did not vote on any of the following matters:
 (a) the 1995 Power Service Agreement (PSA) between Citizens Communications Company (Citizens) and APS; (b) the 2001 PSA between Citizens and PWC; (c) an Agreement entitled "Terms of a Potential Restructuring of the Existing Power Supply Agreement Between Citizens Utilities and APS" dated May 18, 2000 or (d) PWC's Market-Rate Tariff and Modified Code of Conduct filing in FERC Docket ER00-2268-000.



**MARTHA SMITH
ARIZONA PUBLIC SERVICE COMPANY
PINNACLE WEST CAPITAL CORPORATION
CUSTODIAN OF RECORDS**

SUBSCRIBED AND SWORN to before me this 22nd day of March, 2002.


NOTARY PUBLIC

My Commission Expires:

10-1-2005

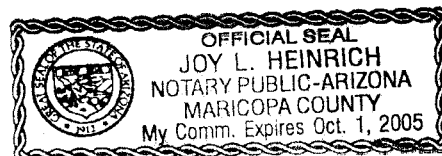


EXHIBIT C

AFFIDAVIT OF MICHAEL KENNEDY

State of Arizona)
) ss.
County of Maricopa)

I, Michael Kennedy, being duly sworn upon my oath, state as follows:

1. I am a founding member of the law firm of Gallagher & Kennedy, P.A. ("G&K") and serve on the firm's Board of Directors.

2. Michael Gallagher also is a founding member of G&K.

3. Mr. Gallagher presently is a shareholder and attorney in G&K, but is semi-retired and left the G&K Board of Directors in 1998.

4. Mr. Gallagher receives a salary for his employment at G&K, but is not entitled to any additional compensation based on the profits of G&K.

5. Mr. Gallagher does not practice in the utilities area and has no supervisory control or responsibility over Michael M. Grant and Todd C. Wiley in their utilities practice.

6. Because Mr. Gallagher serves on the Boards of Directors of Pinnacle West Capital Corporation ("PWC") and Arizona Public Service Company ("APS"), firm policy and the requirements of G&K's malpractice coverage prohibit him from becoming involved in any matter in which G&K renders legal advice or representation concerning or affecting PWC or APS.

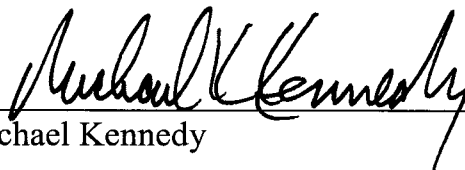
7. G&K has not represented Citizens Communications Company ("Citizens") in any of its contractual disputes with PWC or APS relating to: (1) the 1995

1 Power Service Agreement ("PSA") between Citizens and APS; (2) the 2001 PSA
2 between Citizens and PWC; (3) an Agreement entitled "Terms of a Potential
3 Restructuring of the Existing Power Supply Agreement Between Citizens Utilities and
4 APS" dated May 18, 2000 or (4) PWC's Market-Rate Tariff and Modified Code of
5 Conduct filing in FERC Docket ER00-2268-000 (collectively, the "Power Supply
6 Matters").

7 8. G&K, from time to time, represents Citizens, PWC and APS in
8 matters in which their interests are not adverse.

9 9. In accordance with Rule 1.7 of the Rules of Professional Conduct,
10 after undertaking Citizens' representation in the PPFAC proceeding in Arizona
11 Corporation Commission Docket No. E-01032C-00-0751, G&K consulted with Citizens,
12 PWC and APS concerning the representation and obtained their written consent on
13 December 14, 2000 in the case of PWC and APS, and on January 10, 2001 in the case of
14 Citizens.

15 10. Although I believe Citizens was aware of Mr. Gallagher's service on
16 the PWC and APS Boards of Directors prior to that time, the written consents referred to
17 in the previous paragraph disclosed that fact again.

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Michael Kennedy

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SUBSCRIBED AND SWORN TO before me this 22 day of March

2002 by Michael Kennedy.



Notary Public

My Commission Expires:

6-1-2005
1003824



Notary Public State of Arizona
Maricopa County
Deborah A Francis
Expires June 01 2006